(10)

No. 90-1262

In The

Supreme Court of the United States

October Term, 1990

STATE OF ARKANSAS, *et al.*,

Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES, LEGAL FOUNDATION, IDAHO FARM BUREAU FEDERATION, NORTH DAKOTA FARM BUREAU, WYOMING WOOL GROWERS ASSOCIATION, WYOMING PUBLIC LANDS COUNCIL, MONTANA WOOL GROWERS ASSOCIATION, NEW MEXICO FARM AND LIVESTOCK BUREAU, WYOMING STOCK GROWERS ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, COLORADO FARM BUREAU, OREGON FARM BUREAU FEDERATION, NORTH DAKOTA WATER USERS ASSOCIATION, INC., WASHINGTON STATE FARM BUREAU, MONTANA FARM BUREAU FEDERATION, SOUTH DAKOTA WATER CONGRESS, WYOMING FARM BUREAU, CALIFORNIA FARM BUREAU FEDERATION, COLORADO CATTLEMEN'S ASSOCIATION, AND NEW MEXICO MINING ASSOCIATION IN SUPPORT OF PETITIONER, STATE OF ARKANSAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* on behalf of its members, and on behalf of the Idaho Farm Bureau Federation, the North Dakota Farm Bureau, the Wyoming Wool Growers Association, the Wyoming Public Lands Council, the Montana Wool Growers Association, the New Mexico Farm and Livestock Bureau, the Wyoming Stock Growers Association, the Idaho Wool Growers Association, the Colorado Farm Bureau, the Oregon Farm Bureau Federation, the North Dakota Water Users Association, Inc., the Washington State Farm Bureau, the Montana Farm Bureau Federation, the South Dakota Water Congress, the Wyoming Farm Bureau, the California Farm Bureau Federation, the Colorado Cattlemen's Association, and the New Mexico Mining Association.

INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation (MSLF) is a non-profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state of the country, and who are interested in and affected by the Clean Water Act and the courts' construction thereof. MSLF members include ranchers, miners, cattlemen, and recreationists who not only value but need the stability ensured by western water law.

Participation in the present case allows MSLF to address yet another serious threat to western water law and the rights of sovereign states to control their water resources.

The Idaho Farm Bureau Federation (IFBF) is a free, independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity, environmental awareness and social advancement, and thereby to promote the national well-being. The IFBF currently has 32,481 member families.

The North Dakota Farm Bureau (NDFB) is a free, independent, non-governmental, voluntary organization of farm and ranch families who have joined their county Farm Bureau organizations and are linked with the North Dakota Farm Bureau and the American Farm Bureau Federation, united for the purpose of analyzing their problems and formulating action to achieve education improvements, economic opportunity and social advancement. The NDFB is county, state and national in scope and its influence is non-partisan, nonsectarian and nonsecret in charter. The NDFB has 26,000 members.

The Wyoming Wool Growers Association (WWGA) has been in existence since 1905. 1,200 people raise sheep in Wyoming; 900 are members of the WWGA. Wyoming is the largest range sheep state in the nation. The WWGA is organized for the purpose of promoting Wyoming's industry products (lamb, wool) and of protecting the

growers (who make up the industry) through organization to advance the interest and promote the general welfare of the sheep industry.

The Wyoming Public Lands Council (WPLC) has 3,500 public land permittees in Wyoming. These are both sheep and cattle ranchers who are organized to promote and to protect public land grazing in order to supply high quality food and fiber to the nation's people.

The Montana Wool Growers Association (MWGA) was organized in 1883 and represents producers of sheep on issues facing the livestock industry. The MWGA is a non-profit association which represents 2,917 producers of sheep in Montana.

New Mexico Farm and Livestock Bureau (NMFLB) is an independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement, and thereby, to promote the national well being. The NMFLB is local, county, state, national and international in its scope and its influence is non-partisan, non-sectarian and non-secret in character. The NMFLB is the voice of agricultural producers at all levels. The NMFLB has approximately 10,000 family members.

Wyoming Stock Growers Association's (WSGA) object is to advance the interests of the growers of cattle, sheep, horses, or mules within the State of Wyoming and for the protection of the same against frauds and swindlers, and to prevent stealing, taking, and driving away of cattle, horses and other stock from the rightful

owners thereof, and to uphold the Wyoming stock laws. The WSGA represents 1,500 ranchers in Wyoming.

The Idaho Wool Growers Association (IWGA) was organized in 1894 to protect the quality of life for Idaho Wool Growers and to ensure a high quality of life for coming generations of sheep ranching families. The protection of state water jurisdiction is essential to the quality of life for wool growers. The IWGA currently has 1,370 members.

The purpose of the Colorado Farm Bureau (CFB) is to promote, protect, and represent the business, economic, social, and educational interests of the farmers of the State of Colorado, and to develop agriculture. The CFB has over 16,000 member families representing the entire state.

The Oregon Farm Bureau Federation (OFBF) is a general farm organization that represents 11,000 families. The purpose of the OFBF is to work on behalf of agriculture to improve and to protect the ability of those involved in agriculture to produce food and fiber.

The North Dakota Water Users Association (NDWUA) was formed in 1959 as a non-profit corporation. Its members include farmers, ranchers, irrigators, and all types of businesses and entities which are concerned about North Dakota's water resources. The purpose of the NDWUA is to protect, develop, and manage North Dakota's water resources. The NDWUA has 6,700 members.

The Washington State Farm Bureau (WSFB) is a general farm organization of 5,400 family members. As a

voluntary non-governmental organization, the WSFB seeks to improve agriculture for its members by being involved in issues affecting agriculture, its individuals, and the nation. WSFB eagerly works for long-term answers, rather than short-term reactions.

The Montana Farm Bureau Federation (MFBF) is a free, independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being. The MFBF is local, statewide, national and international in its scope and influence and is non-partisan, non-sectarian, and non-secret in character. The MFBF is a Federation of thirty-two county Farm Bureaus representing 4,000 farm and ranch families.

The South Dakota Water Congress (SDWC) was organized in 1974 to promote responsible management and development of water resources in the State of South Dakota. The SDWC has a membership of approximately 500 associations, corporations, families and individuals.

The Wyoming Farm Bureau Federation (WFBF) is a non-profit organization formed for the express purpose of helping agricultural producers with problems which affect their livelihood. The WFBF represents approximately 2,500 agricultural producers.

The California Farm Bureau Federation (CFBF) is a voluntary membership non-profit corporation. Its primary purpose is to work for the solution of the problems of the farm, the farm home, and the rural community, and to represent, protect, and advance agricultural interests

throughout the State of California. Its members consist of 53 county Farm Bureaus with a combined membership of over 83,000 families. Over 80% of all commercial farmers in California are members of the CFBF.

The Colorado Cattlemen's Association (CCA) is the trade association for Colorado's beef producers and serves as the industry spokesperson to consumers, media, government agencies, and legislators. Founded in 1867, the CCA is the nation's oldest state cattlemen's association. With 47 local county affiliates across the state, the CCA currently services over 2700 dues-paying members.

The New Mexico Mining Association (NMMA) is composed of 22 operating mining companies, 60 associated companies that supply the mining industry with equipment, services, and material, and approximately 400 individual members. The NMMA is an advocate for the mining industry and the responsible development of mineral products in New Mexico, including access to water supplies necessary for the development of mineral commodities.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the State of Arkansas' Statement of the Case and Statement of Facts.

SUMMARY OF ARGUMENT

This case presents several issues vital to the survival of state sovereignty as it has come to be known over the

past two centuries. The Tenth Circuit, in *State of Okl. v. E.P.A.*, 908 F.2d 595 (10th Cir. 1991), made two erroneous holdings in its interpretation of the Clean Water Act (CWA). First, the Tenth Circuit stated that discharges in upstream source states which may eventually reach the waters of a downstream state are prohibited if the downstream state is in violation of its own water quality standards (WQS). Second, the Tenth Circuit held that the WQS of a downstream state, which may be more stringent than those of an upstream state, must nonetheless be rigidly applied to the upstream state in the context of a discharge from the upstream state which may eventually flow into the waters of the downstream state. This decision must be reversed for several reasons.

First, the decision of the Tenth Circuit is inconsistent with previous holdings of this Honorable Court with regard to these issues. The Supreme Court has stated unconditionally that, under the CWA, courts are precluded from applying the law of an affected downstream state against an upstream source state.

Second, the holding of the Tenth Circuit is at odds with the language of the CWA itself, which specifically provides that affected states may not regulate the WQS of source states. Moreover, the CWA furnishes a remedial program that allows new discharges or increased discharges from existing sources for states which are in violation of their WQS. Combining this provision with the Tenth Circuit holding, a downstream state in violation of its own WQS may permit increased discharges while prohibiting such discharges in an upstream state which is within its WQS.

Finally, the decision of the Tenth Circuit violates two important constitutional principles. First, in allowing a downstream state – and possibly an indian tribe – to dictate the WQS of an upstream source state, the Tenth Circuit is infringing upon the sovereignty granted to the states by the Tenth Amendment to the United States Constitution. Second, the decision infringes upon the power of the Congress to regulate interstate commerce in a situation where uniformity is necessary.

Undoubtedly, the Tenth Circuit overstepped its authority in rendering its decision in the case at bar. This Honorable Court must reverse the decision.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS INCONSISTENT WITH PREVIOUS UNITED STATES SUPREME COURT AND CIRCUIT COURT HOLDINGS THAT THE EXTRATERRITORIAL LAW OF A DOWNSTREAM STATE CANNOT BE APPLIED TO AN UPSTREAM STATE.

The Tenth Circuit's holding that a downstream state can impose its water quality standards (WQS) upon an out-of-state facility, and that neither the Environmental Protection Agency (EPA) nor the upstream state has any flexibility in applying or interpreting the WQS of the downstream state, is inconsistent with previous federal court decisions. Only four years ago, this Honorable Court, in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), held that the Clean Water Act preempts a private water pollution suit based upon the common law of nuisance of the state in which the alleged injury occurred,

when the source of the alleged injury is located in another state. The Supreme Court rendered this decision only after a detailed analysis of the relevant portions of the Clean Water Act and the intent of the Congress behind it. As this Honorable Court stated:

> After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Congress." [citations] Because we do not believe Congress intended to undermine this carefully drawn statute . . . , we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

479 U.S. at 493-494.

The Seventh Circuit, correctly anticipating this view of the Supreme Court, issued a similar holding in *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), a consolidation of two cases concerning the application of affected state common law to source state discharges. The opinion contains an in-depth discussion of federalism and the need for interstate disputes to be resolved by applying federal law. The Seventh Circuit recognized that the use of an interstate body of water involves the interests of different states and apportionment among users is a matter of special federal concern and the subject of federal law. As the Seventh Circuit stated:

> To argue that all states have an interest in abating water pollution and therefore the interstate application of one state's more stringent standards would benefit all is too simplistic. There

> are legitimate state concerns on both sides of the question . . . . This is a controversy of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution. The latter state does not seek mere enforcement of effluent limitations under federal law, but imposition of more stringent limitations.

731 F.2d at 410.

The Seventh Circuit correctly concluded that federal law must govern in situations such as these except to the extent that the 1972 CWA authorizes resort to state law. As this Honorable Court noted in *Ouellette*, "[i]t is unlikely – to say the least – that Congress intended to establish such a chaotic regulatory structure." 479 U.S. at 497.

The Tenth Circuit, in the case at bar, contends that Petitioners' reliance on *Ouellette* and *Milwaukee* is misplaced because the present case involves the applicability of the "federally approved WQS" of an affected downstream state rather than state statutory or common law. *State of Okl. v. E.P.A.*, 908 F.2d 595, 608 (10th Cir. 1990). This insupportable conclusion ultimately will result in the very problem which the Supreme Court attempted to prevent in its *Ouellette* decision – unavoidable chaos through confrontations between sovereign states over a single discharge. The fact that the WQS in question are federally approved is irrelevant. They are still separate state standards adopted by the affected states and only then "approved" by the federal government, if within the permitted standards of the CWA. As a result, the conclusion of the Tenth Circuit that they are federal standards is incorrect. To that degree, the standards of both states are "federal standards." Thus, the Tenth Circuit gives life to

the dilemma which this Honorable Court attempted to exterminate in *Ouellette*.

Ironically, the Tenth Circuit itself previously recognized:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside of its domain.

Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971). That very entitlement and necessary recognition was the manner in which this Honorable Court dealt with such interstate conflict in *Ouellette*. The decision of the Tenth Circuit is in conflict with *Ouellette* and should, therefore, be reversed.

II. THE TENTH CIRCUIT HOLDING IS DIRECTLY INCONSISTENT WITH THE LANGUAGE OF THE CLEAN WATER ACT.

The text of the CWA does not support the Tenth Circuit's holding that no new discharges or increased loads from existing discharges are to be permitted when a relevant WQS is already being violated. The Tenth Circuit itself stated that there is no "explicit imprimatur" in the CWA for this decision. 908 F.2d at 633. This holding gives affected downstream states an absolute veto power over a permit lawfully issued within a source state under the CWA. This is inconsistent with the plain language of the CWA as enacted by Congress.

A summary of the relevant portions of the CWA is helpful here. Interestingly, the CWA encourages cooperative activities by states such as uniform state laws for the prevention, reduction, and elimination of pollution. 33 U.S.C. §1253(a). However, under the CWA, a state may obtain authority to administer its own permit program for discharges into navigable waters within its jurisdiction. 33 U.S.C. §1342(b). This Honorable Court, in *Ouellette*, construed this provision to mean that "an affected state may *not* establish a separate permit system to regulate an out-of-state source." 479 U.S. at 491. (Emphasis added.)

Of particular importance to the case at bar are the provisions regarding an affected state's rights under the CWA. An affected state does not have the authority to block the issuance of a permit in another state if it is dissatisfied with the proposed standards. Its remedy lies with the EPA Administrator who has the discretion to disapprove the permit if the Administrator finds that the discharge will have an undue impact on interstate waters. 33 U.S.C. 1342(d)(2). As this Honorable Court noted in *Ouellette*:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States.) Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders.

479 U.S. at 490.

Moreover, the CWA provides for those states which are experiencing WQS violations. Those states are to implement waste load allocation plans designed to bring affected waterways within their state into compliance. 33 U.S.C. §1313(d).

Of further significance to the instant case is what is known as the "savings clause." This portion of the CWA allows states to enforce standards involving discharges of pollutants and preserves the state's jurisdiction over the waters located within the state. 33 U.S.C. §1370. The Supreme Court has construed this language narrowly:

> This language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State. The savings clause then, does not preclude preemption of the law of an affected State.

Ouellette, 479 U.S. at 493.

One more provision in the CWA deserves mention. The CWA contains a liberal citizen suit provision at 33 U.S.C. §1365, which allows private individuals to commence a civil action against any person, including a state or the United States Government, who is alleged to be in violation of effluent standards under the CWA or in violation of an order issued by the Administrator or a state with respect to such standards. The Tenth Circuit's holding, which allows downstream states to require upstream states to comply with the WQS of downstream states and thereby gives downstream states the power to veto permits if the downstream state is in violation of its own WQS, will result inevitably in a rash of citizen suits under the CWA. It is doubtful that Congress intended this provision to have such an effect.

This language of the CWA and the construction thereof by this Honorable Court is clearly irreconcilable with the Tenth Circuit's holding below. An affected downstream state has no authority to ban a permit issued under the CWA. Such authority would render the entire permitting process meaningless. An affected state's remedy in such a situation lies exclusively with the EPA Administrator.

Additionally, an affected state is not without a cure if it is in violation of its WQS. The CWA, under its waste allocation provision, allows new discharges or increased discharges from existing sources consistent with an approved waste allocation plan. Indisputably, the Tenth Circuit's approach in allowing an absolute ban of new discharges in upstream states by affected downstream states which are in violation of their WQS, without regard to their impact on water quality, is directly inconsistent with the CWA. The Tenth Circuit makes the CWA nonsensical because it gives downstream states the ability to increase discharges while exceeding their own WQS, yet these same downstream states can stop discharges from upstream states which are within the WQS of those upstream states. This decision should, thus, be reversed.

III. THE DECISION OF THE TENTH CIRCUIT VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Accordingly, each state is entitled to its own

autonomy and self-government. As this Honorable Court stated in *Parker v. Brown*, 317 U.S. 341 (1943):

> The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers.

317 U.S. at 359-360.

The decision of the Tenth Circuit to impose the WQS of a downstream affected state on an upstream source state amounts, in effect, to a grant of power to downstream states to enact laws with which upstream states must comply. This decision, if it is allowed to stand, will constitute the beginning of the destruction of the autonomy the states currently enjoy under the Tenth Amendment. With regard to the states' sovereignty, there is nothing more sacred, vital, and essential than a western state's right to control its own water resources.

Ever since gold was panned in California, westerners – through each state's carefully-crafted and developed water law – have been in control of the most important resource of the arid West: water. Congress has repeatedly recognized and deferred to the right of Western states to control their own destiny by having sole jurisdiction over who may obtain and use water rights.

The Tenth Circuit's disregard for the liberty states have possessed since the enactment of the Bill of Rights two hundred years ago this year is troublesome. To preserve state sovereignty, this Honorable Court must reverse the decision of the Tenth Circuit.

IV. THE DECISION OF THE TENTH CIRCUIT, IN LIGHT OF THE PROVISION IN THE CWA WHICH ALLOWS THE EPA TO TREAT INDIAN TRIBES AS STATES, FURTHER INFRINGES UPON STATE SOVEREIGNTY.

The CWA, in 33 U.S.C. §1377, allows the EPA Administrator to treat an indian tribe as a state for purposes of setting WQS and issuing National Pollutant Discharge Elimination System (NPDES) permits. In 1989, the EPA commenced rulemaking with regard to the requirements an indian tribe must meet in order to be considered a state pursuant to this provision.

Applying this provision of the CWA to the Tenth Circuit's decision, an upstream state will have to deal with and address the possibility of more stringent WQS, not only of downstream states, and not only of downstream indian tribes, but also indian tribes within the state itself.

This issue is of more than academic interest to western states. According to 1985 Bureau of Indian Affairs figures and 1974 Department of Commerce figures, some 157 Indian reservations comprising more than 43,878,209 acres are located within the eleven western states.[1] These Indian reservations sit astride or encompass tributaries of the major rivers of the West, including the Colorado River, the San Juan River, the Missouri River, the Yellowstone River, the Columbia River, and the Spokane River.

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[1] These reservations make up a significant portion of many states. Arizona's reservations consist of 20,019,723 acres or 27% of Arizona. California's reservations consist of 568,765

(Continued on following page)

This development poses another significant threat to a state's right to self-government and autonomy. Not only does a state face the possibility of being forced to comply with the WQS of a downstream state and downstream indian tribe, it also encounters the possibility of having its own WQS challenged by an indian tribe within its own borders. Thus, the ruling of the Tenth Circuit threatens the ability of an individual state not only to shield its sovereignty from sources outside its borders, but also from sources within its own borders as well. The Tenth Circuit's decision is detrimental to the autonomy of individual states and must be reversed.

V. THE DECISION OF THE TENTH CIRCUIT IMPOSES AN UNDUE BURDEN ON INTERSTATE COMMERCE.

Article I, Section 8, Clause 3 of the United States Constitution gives Congress the power to regulate commerce among the several states. This Honorable Court defined the term "commerce" in *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436 (1920):

(Continued from previous page)

acres or .6% of California. Colorado's reservations consist of 788,375 acres or 1% of Colorado. Idaho's reservations consist of 791,377 acres or 1% of Idaho. Montana's reservations consist of 5,208,686 acres or 6% of Montana. Nevada's reservations consist of 1,223,779 acres or 2% of Nevada. New Mexico's reservations consist of 7,747,940 acres or 10% of New Mexico. Oregon's reservations consist of 768,665 acres or 1% of Oregon. Utah's reservations consist of 2,319,916 acres or 4% of Utah. Washington's reservations consist of 2,553,722 acres or 6% of Washington. Wyoming's reservations consist of 1,887,261 acres or 3% of Wyoming.

> Commerce, . . . is not traffic alone, it is intercourse, – "It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

252 U.S. at 442.

This broad definition undoubtedly encompasses the transfer of substances among states via interstate waterways. The decision of the Tenth Circuit, in prohibiting discharges in upstream source states which may eventually reach the waters of a downstream state because the downstream state is in violation of its own WQS, imposes an undue burden on interstate commerce. Because the CWA allows the downstream state to continue discharges, this holding gives downstream states significantly more opportunity than the upstream states to use its water resources. This is a clear imposition upon interstate commerce which is detrimental to upstream states.

Likewise, the Tenth Circuit's decision to impose rigidly the WQS of a downstream state on an upstream state burdens interstate commerce. The Tenth Circuit has no authority to grant such liberal power to downstream states to impose limitations on interstate commerce. The power to regulate such commerce belongs to Congress and Congress alone. Congress' direction for the regulation of this type of commerce is found in the CWA.

As the Supreme Court held:

> Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation . . . . Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific

> determination as to whether or not the statute in question is a burden on commerce.
>
> * * *
>
> [E]ven where Congress has not acted, state legislation *or a final court order is invalid which materially affects interstate commerce.*

Morgan v. Commonwealth of Virginia, 328 U.S. 373, 377-378 (1946) (Emphasis added). The Tenth Circuit's decision burdens interstate commerce and must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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May 1991